

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	
LAKE COUNTRY INVESTMENTS,)) Case No. 99-20287
Limited Liability Company,)	
)	
Debtors.)	MEMORANDUM OF DECISION
)	AND ORDER; NOTICE OF
)	HEARING
)	
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HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Joseph A. Esposito, ESPOSITO TOMBARI GEORGE TOPLIFF & CAMPBELL, P.S.,
Spokane, Washington, chapter 11 Trustee

Michael J. Paukert, PAINE HAMBLIN COFFIN BROOK MILLER, LLP, Spokane,
Washington, for Arrow Point Development Co., Inc.

Gary L. McClendon, Office of the U.S. Trustee, Boise, Idaho.

INTRODUCTION

Chapter 11 Trustee Joseph A. Esposito ("Trustee") has asked the Court to approve his employment of Stanley A. Short, Jr. a certified public accountant ("Short") as a professional. 11 U.S.C. § 327(a). An objection is lodged to the Trustee's request by Arrow Point Development Co., Inc. ("APDC"). No other objections were raised. The matter was heard on June 14 and taken under advisement.

BACKGROUND

By application filed August 10, 1999, the Trustee sought approval of employment of certified public accountant, Michael J. Bibin ("Bibin"). That application was granted by Order of October 13, 1999. The Bibin application reflected that this accountant was to provide tax advice, prepare tax returns, perform general accounting services, and prepare schedules and statement of financial affairs. Application, at paragraphs 1 - 3.

The Trustee filed on June 6, 2000 his application to approve the employment of Short. The Trustee claims a second accountant is needed for analysis and testimony as an expert witness in fraudulent conveyance litigation, and contends that Short is well qualified for this role¹.

The Trustee's application for approval of Short's employment reflects that Short is disinterested, holds or represents no adverse interest, and is qualified to be employed under § 327(a). That application indicates, in regard to the services to be rendered, that Short will prepare affidavits and testify in one or more adversary proceedings. It also states, however, that he will provide tax advice, assist in the preparation of schedules and statement of financial affairs, and provide other accounting services. Application, at paragraphs 1, 3. These are tasks similar in

¹ The Trustee has already obtained from Short an analysis and statement of opinion regarding matters at issue in *Esposito v. Noyes*, Adversary No. 00-6057. A June 8 "declaration" of Short was filed by the Trustee in that action in opposition to the Defendants' motion for summary judgment.

scope and function to those which were to be performed by Bibin. The Trustee argues this language in the Short application is merely “boiler plate” and that all general accounting work for the Trustee will be performed by Bibin. Thus, the Trustee contends the function to be served by Short is solely in reference to avoidance litigation and should be approved.

APDC argues that there has been no showing that the Trustee’s current accountant cannot provide the described adversary-related services, that multiple accountants needlessly increases the number of professionals and the administrative burden upon the estate, and that the estate is presently administratively insolvent and should not suffer the additional impact of Short’s retention.

Retention of professionals under § 327(a) is committed to the sound discretion of the Trustee, subject to Court review and approval. The general threshold question is the absence of adversity or conflict of interest, compliance with the disinterestedness standard, and consideration of connections with parties in interest. See § 327(a), Fed.R.Bankr.P. 2014(a).

The Trustee’s submissions adequately establish Short’s professional qualifications. No argument is raised that Short is adverse or otherwise disqualified under the terms of § 327(a) or Rule 2014. The first hurdle is thus passed.

In regard to the impact of Short’s retention on the estate, the monthly financial reports filed by the Trustee since his appointment, the representations of the parties, and the record in its fullness all support the idea that the estate is or may ultimately be administratively insolvent. Whether or not a plan can be confirmed which will provide

for payment in full of all administrative expenses and for payment of claims as required by the Code is a matter of some speculation. There presently is no plan before the Court. The only proponent of a plan, West Wood, has withdrawn the same.

This would indicate a lack of resources necessary to compensate professionals and suggests caution in allowing the Trustee to increase the number of accountants. However, as the situation exists today, the impact of improvident retention of additional professionals is not going to be suffered by the general unsecured creditors of the estate. Rather, it will be most significantly felt by the existing professionals and the Trustee who may be forced to share limited funds among themselves.

Additionally, the Court concludes that any questions concerning inappropriate or improvident use of professionals, including issues of duplication of services or lack of value to the estate, can be adequately addressed in hearings upon requests for compensation. That process provides the Court and interested parties a vehicle with which to ensure that the estate is not paying twice for the same services or is incurring incrementally increased costs because the Trustee elects to have two separate accountants assisting him.

It therefore appears that the application to employ Short can be granted and the employment approved.

However, in resolving the question of Short's employment and APDC's objection, another issue has become apparent to the Court. The application of Bibin

indicated at paragraph 7 that he was a pre-petition creditor, but that he waived any prepetition claims against the debtor or estate. This was, of course, prerequisite to approval of employment.

In addition, paragraphs 8 and 9 of the application also disclosed that Bibin was and continued to be the accountant for several parties in interest in this case. The Trustee alluded, at the hearing on June 14, to the possibility that Bibin might have difficulty in performing certain services for the Trustee or rendering certain opinions because of his prepetition work for the debtor and/or this continuing relationship with other parties.

The Court considered, at the time of Bibin's employment approval, the fact that he had previously provided services to the debtor. That fact actually enhanced his value to the Trustee in respect to preparing schedules and other required pleadings, and the waiver of Bibin's claims against the debtor and the estate appeared sufficient to address any lack of disinterest or adversity. In all candor, however, the Court gave less attention to the other issues implicated by paragraphs 8 and 9 of the application.²

The Court deems it appropriate, under the requirements of § 327(a) and in light of the responsibility of the Court to ensure compliance with those requirements, to consider the question of whether Bibin's employment should be continued and, if so,

² As best the Court can recall, or determine through review of the file, neither the U.S. Trustee nor any creditor or party in interest raised objections to the Trustee's employment of Bibin.

whether it should be circumscribed in some fashion. For that reason, and under the authority of § 105, the Court will schedule a hearing to consider these issues.

CONCLUSION AND NOTICE OF HEARING

For the reasons stated, the Court will hold a hearing on July 18, 2000 at 9:30 a.m. in the U. S. Bankruptcy Court Courtroom, Federal Building, 4th and Lake Streets, Coeur d'Alene, Idaho, to consider the propriety of continued employment of accountant Michael J. Bibin by the Trustee and the scope of engagement if so employed.

The Trustee's application to employ Stanley A. Short, Jr. is GRANTED and his requested employment of Short in regard to adversary proceedings is APPROVED.³ In light of the questions concerning the scope of engagement of the Trustee's prior accountant, the granting of the application to employ Short is made without prejudice to the right of the Trustee to seek approval of a more extensive engagement for that accountant.

Dated this 21st day of June, 2000.

³ Pursuant to L.B.R. 2014.1(c), the approval of Short's employment is effective as of June 2, 2000, the date of service of the application.